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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-540

THE NEW YORK TIMES COMPANY AND MYRON FARBER
Petitioners,

v.

THE STATE OF NEW JERSEY AND MARIO E. JASCALEVICH
Respondents.

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Newspaper Publishers Association (ANPA) respectfully moves this Court for leave to file the accompanying Brief Amicus Curiae in support of the Petition for a Writ of Certiorari filed herein. Although the attorneys for

Petitioners, the New York Times and Myron Farber, and the Attorney General for Respondent, the State of New Jersey, have consented to ANPA's filing of a brief as amicus curiae, the Respondent, Mario E. Jascalevich has withheld consent.

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1307 newspapers constituting more than 91 percent of the total daily and Sunday newspaper circulation in the United States. ANPA is concerned with issues of general significance to the profession of journalism and the newspaper business and, over the years, ANPA on several occasions has presented its views to the Supreme Court of the United States and to other federal and state appellate courts. ANPA numbers seventy-one members in the State of New York and twenty-nine in the State of New Jersey.

In its efforts to stay abreast of the broad realm of matters affecting the people of our country as served by our newspaper members, and the journalists who work for them, ANPA is ever vigilant to protect the public's right, under the First Amendment, to information concerning the activities of government and matters of public interest. ANPA and its members are vitally interested in protecting and maintaining the primary function of newspapers under our value system; namely, the gathering of information for dissemination to the people of our country. To insure the free and uncensored flow of information to the public, daily newspapers and their employees must be free to seek out newsworthy information from sources on a confidential basis and to assert, without threat of a contempt citation, the merits of the constitutional and, where available statutory privilege against compelled disclosure thereof. Although the first amendment right of news gathering, implicated herein by petitioners' refusal to divulge information gathered from confidential news sources, is not unlimited, *Houchins* v. *KQED, Inc.*, ____U.S.____, 57 L.Ed.2d 553 (1978), it nevertheless is entitled to both substantive and

procedural constitutional protections. See, *Branzburg*, v. *Hayes*, 408 U.S. 665, 681, 707 (1972); *Pell* v. *Procunier*, 417 U.S. 817, 833 (1974); *Baker* v. *F. & F. Investment Co.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Tribe, American Constitutional Law*, §§12-34, 35, 36 (1978).

The contempt judgments against petitioners, upheld by the Supreme Court of New Jersey, not only constitute a serious intrusion upon the privilege which protects a newsman's sources, but, more importantly, they represent a clear abuse of the trial court's inherent power to punish for contempt and a shocking denial of the fundamental right of due process. The trial court's denial to petitioners of their right to be heard in the instant case is a more egregious violation of constitutional rights than was the "gag order" recently overturned by this Court in *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976). In that case, it was the trial court's insensitivity to the significant First Amendment values involved which led to entry of the erroneous order. In the instant case, a similar insensitivity has been exacerbated by the trial court's refusal to honor the dictates of procedural due process.

Because of the importance of the issues sought to be presented to this Court by the Petition for a Writ of Certiorari, ANPA desires to present to this Court, for its assistance, the Association's views in regard to the significant issues involved in this proceeding.

WHEREFORE, the American Newspaper Publishers Association respectfully requests this Court to grant this motion and permit ANPA to file the Brief Amicus Curiae attached hereto and submitted herewith.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (ANPA) submits this brief amicus curiae in support of Petitioners', The New York Times and Myron Farber, Petition for a Writ of Certiorari.

INTEREST OF THE AMICUS CURIAE

As set forth in its motion for leave to file this brief and as restated herein, ANPA and its members have a significant concern for insuring that the First Amendment's guarantee of a free press shall not be abridged.

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1307 newspapers constituting more than 91 percent of the total daily and Sunday newspaper circulation and a significant portion of the weekly newspaper circulation in the United States. ANPA is concerned with issues of general significance to the profession of journalism and the newspaper business and, over the years, ANPA on several occasions has presented its views to the Supreme Court of the United States and to other federal and state appellate courts. ANPA numbers seventy-one members in the State of New York and twenty-nine in the State of New Jersey.

In its efforts to stay abreast of the broad realm of matters affecting the people of our country as served by our newspaper members, and the journalists who work for them, ANPA is ever vigilant to protect the public's right, under the First Amendment, to information concerning the activities of government and matters of public interest. ANPA and its members are vitally interested in protecting and maintaining the primary function of newspapers under our value system: namely, the gathering of information for dissemination to the people of our country. To insure the free and uncensored flow of information to the public, daily newspapers and their employees must be free to seek out newsworthy information from sources on a confidential basis and to assert, without threat of a contempt citation, the merits of the constitutional and, where available, statutory privilege against compelled disclosure thereof. Although the first amendment right of news gathering, implicated herein by petitioners' refusal to divulge information gathered from confidential news sources, is not unlimited, *Houchins* v. *KQED, Inc.*, ___*U.S.*___, 57 L.Ed. 2d 553 (1978), it nevertheless is entitled to both substantive and procedural constitutional protections. See, *Branzburg*, v. *Hayes*, 408 U.S. 665, 681, 707 (1972); *Pell* v. *Procunier*, 417 U.S. 817, 833 (1974); *Baker* v. *F. & F. Investment Co.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Tribe, American Constitutional Law*, §§12-34, 35, 36 (1978).

ANPA filed a brief amicus curiae in this case before the Supreme Court of New Jersey in which it presented many of the same views as are reflected in the dissent of Justice Pashman. (Appendix A to Petition). The contempt judgments entered by the trial court, and affirmed by the Supreme Court of New Jersey, represent serious breaches of the limits provided by the First Amendment and the Due Process Clause of the Fourteenth Amendment. Because of the importance of this issue as it relates to the questions sought to be placed before this Court by the Petition for a Writ of Certiorari, ANPA desires to present to this Court, for its assistance, the Association's views in regard to the significant issues involved in this proceeding.

Questions Presented, Constitutional and Statutory Provisions Involved and Statement of the Case

ANPA adopts the questions presented, constitutional and statutory provisions involved and statement of the case, all as set forth in the Petition for a Writ of Certiorari.

ARGUMENT

In reviewing the contempt judgments against petitioners, the Supreme Court of New Jersey stated:

> While we agree, then, that appellants should be afforded the hearing they are seeking, one procedural aspect of which calls for their compliance with the order for *in camera* inspection, we are also of the view that they, and those who in the future may be similarly situated, are entitled to a preliminary determination before being compelled to submit the subpoenaed materials to a trial judge for such inspection.

Notwithstanding, that court affirmed the judgments of contempt, while recognizing that "Judge Arnold refused to give

ultimate rulings with respect to relevance and other preliminary matters." In his opinion, rendered June 30, 1978, Judge Arnold stated that he would neither grant a "full hearing" nor decide if production was barred by the Constitution, the New Jersey "Shield Law," or other legitimate defenses, until petitioners had complied with the order to produce the materials sought *in camera*. (Appendix C to Petition at 62a). There can be no question that petitioners were denied their fundamental due process right which mandates that they be afforded the opportunity to be heard.

Last term, in *Zurcher* v. *Stanford Daily*, ____ U.S. ____, 56 L.Ed. 2d 525 (1978) this Court held constitutional under the First and Fourth Amendments, a search of a newspaper office for evidence of a crime, pursuant to a search warrant issued after a showing of probable cause that evidence of a crime was in the newspaper's possession. Respondent newspaper had argued that a subpoena *duces tecum* should have been utilized as an alternative to the more intrusive police search pursuant to a warrant. In rejecting this contention, Justice White, writing for the court noted that:

> [T]he delay involved in employing the subpoena *duces tecum, offering as it does the opportunity to litigate its validity,* could easily result in the disappearance of the evidence, whatever the good faith of the third party. 56 L.Ed. 2d at 539 (emphasis added).

It was argued in *Zurcher* that the issuance of a search warrant, directed against innocent third parties believed to be in the possession of evidence of a crime, provided insufficient safeguards. As Justice White recognized, individuals who are served with subpoenas requiring the production of materials in connection with a criminal proceeding are accorded the protections of the requirements of due process. The Court pointed out, however, that similar safeguards exist in the case of the warrant procedure since all of the protections of the Fourth Amendment obtain, and the judiciary plays a crucial role by

requiring "probable cause, specificity with respect to the place to be searched and the things to be seized and overall reasonableness." 56 L.Ed. 2d at 541.

The implication of the court's reasoning is clear. In the case of a search warrant, judicial intervention is mandated by the Fourth Amendment, and occurs at the time of the probable cause hearing. In the case of a subpoena, a party must be given the "opportunity to litigate its validity" by means of a hearing on a motion to quash, repeatedly alluded to by the majority opinion in *Zurcher*.

Petitioners herein have had no such opportunity to litigate the validity of the subpoena. The trial judge has summarily ordered them to comply with the subpoena on pain of contempt based solely on the *ex parte* representations of defense counsel in a murder case.

Your *amicus* asserts that the standards of reasonableness required by the Fourth Amendment, which mandate a finding of probable cause and careful limitation of the scope of any search, apply equally in cases where an individual's "private papers" are the subject of subpoenas. In *Bowman Dairy Co.* v. *United States*, 341 U.S. 214 (1951), this Court held that a party could not be held in contempt for refusing to comply with a "catch-all provision" of a subpoena which was not designed to produce admissible evidence, but was rather a device to facilitate a "fishing expedition." *Id.* at 221. This Court stated:

> One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to tell the good from the bad. *Id.*

The subpoena at issue is clearly overbroad on its face. As the above cited case indicated, this Court will no more sanction the enforcement of a patently overbroad subpoena, than it will uphold the validity of an overbroad and unreasonable search

since, as Justice White clearly indicates in *Zurcher*, the "privacy interests" to be protected are the same whether threatened by unreasonable warrant or overbroad subpoena. See, 56 L.Ed. 2d at 539-40.

In recognition of the need to protect "privacy interests," as well as the equally important need to protect "privileged" or "confidential" information, both the courts and the executive branch have formulated basic principles which apply when information is sought from a third party in connection with a criminal proceeding. In such situations, the party seeking information has the initial burden of establishing relevancy, materiality, necessity for production of the materials, and unavailability of the materials from other sources. The requirement that a seeking party meet this threshold burden is reflected in Federal Rule of Criminal Procedure 17(c) and regulations governing the issuance of subpoenas by federal prosecutors to members of the press.

Section 50.10 of Title 28 of the Code of Federal Regulations requires that before a federal prosecutor may issue a subpoena directed at a member of the news media, he must obtain the approval of the U.S. Attorney General who is required to balance the competing interests of the public in the free dissemination of information against the need for effective law enforcement and the fair administration of justice. In striking the balance, the Department of Justice must consider the following factors: (1) there must be reasonable belief based on non-media information that a crime has occurred; (2) there should be reasonable ground to believe that the information sought is essential to a successful investigation—particularly with reference to establishing guilt or innocence; (3) the government should have unsuccessfully attempted to obtain the information from alternative non-media sources; (4) except under exigent circumstances subpoenas should be limited to verification of published information; (5) even the appearance of harrassment of media personnel should be avoided; (6)

subpoenas should be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of the newsperson's unpublished material.

These guidelines reflect the strong public policy of the executive branch against requiring testimony from newspersons in the absence of compelling need on the part of government. Moreover, the specificity requirement is fully consistent with this Court's holding in *Bowman Dairy, supra.*

In addition to these substantial federal administrative protections, the courts have recognized the necessity for narrowly circumscribed subpoenas, and the importance of allowing a full hearing on the overbreadth issue pursuant to a motion to quash. Under the Federal Rules of Criminal Procedure it is insufficient to seek production of documents on the bare assertion that they may be useful to the seeking party. There must be a showing of "good cause" to entitle the seeking party to the production and inspection of documents under Rule 17(c). The moving party has the burden of establishing such "good cause" by showing: 1) that the documents sought are evidentiary and relevant: 2) that they are not otherwise procurable by the defendant; and 3) that the application is made in good faith and is not intended as a "fishing expedition." Rule 17(c) does not authorize rummaging through files at will, and, therefore, any request for production must be specific. *United States* v. *Nixon*, 418 U.S. 683 (1974); *United States* v. *Iozia*, 13 F.R.D. 335 (S.D.N.Y. 1952).

In *United States* v. *Nixon*, 418 U.S. 683 (1974), the then President of the United States, Richard M. Nixon, a third party not directly involved in the criminal trial in question, was afforded an extensive hearing, pursuant to a motion to quash subpoenas directing him to produce confidential papers and tapes from his personal files. Following a "lengthy and detailed showing [of the government's] need, for the subpoenaed items and their relevance," the President was required to turn over his private papers and tapes for *in camera* inspection.

If the decision of the New Jersey Supreme Court denying petitioners' right to a similar showing is allowed to stand, it can only create the impression that two standards exist for protecting the due process rights of third parties who allegedly possess material related to criminal trials—one for Presidents and another for newspapers and journalists.

In yet another Watergate related case, *United States* v. *Liddy*, 354 F.Supp. 208, (D.D.C.), *motion for stay denied*, 478 F.2d 586 (D.C.Cir. 1972), Chief Judge John Sirica enforced a subpoena directed at a newsman, but only after affording a full hearing to determine the need for the information, and the exhaustion of alternative sources. As Judge Sirica pointed out in his opinion, the case presented "unique facts." Before his trial for Watergate activities began, Liddy sought, for purposes of impeachment at trial, materials in the possession of Alfred C. Baldwin III, a key government witness who claimed to have personally observed the Watergate bugging. Baldwin's response to Liddy's initial subpoena was that he had given the materials to John Lawrence, Washington Bureau Chief and staff writer for the Los Angeles Times. Liddy then directed a second subpoena, limited to materials admissible in evidence for impeachment, to Lawrence. Judge Sirica denied a motion to quash by The Times and ordered Lawrence to produce the materials.

The result was reached only after it was shown at the hearing that the defendant sought only relevant information, admissible in evidence and that the only alternative source had been exhausted. There was never any suggestion that *in camera* disclosure prior to such a showing was ever considered. Judge Sirica further emphasized the limited nature of the materials sought:

> [w]e are not dealing here with documents or objects subpoenaed for discovery purposes. This is not the "fishing expedition" which exceeds the authority conferred and objective contemplated by Rule 17. The defendants seek only those statements on the tapes, if any, which may be admissible as impeachment evidence. The Court will not allow the materials produced pursuant to the subpoena to be employed by the parties as a springboard for discovery. *Id.* at 212.

Judge Sirica's approach is in accord with several recent cases decided by State Supreme Courts which rejected attempts by criminal defendants to compel disclosure of news sources. In *State* v. *St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974), the court held that "legitimate objections to disclosure based on First Amendment grounds require careful evaluation by the judicial officer before answers are compelled, or the sanctions of fine or imprisonment imposed," *Id.* at 256; and, that on the facts disclosure was not required because defendant established neither relevance nor that the information wasn't otherwise available. Similary, in *Brown* v. *Commonwealth*, where a defendant in a murder case sought evidence for impeachment, the Virginia Supreme Court held that a reporter's confidential sources are protected by "a privilege related to the First Amendment," which requires that the information sought be "material" and "essential to a fair trial." 214 Va. 755, 204 S.E. 2d 429, 431 *cert. denied*, 419 U.S. 966 (1974). *See also*, *Zelenka* v. *Wisconsin*, 266 N.W.2d 279 (Wisc. 1978).

In all of the above cases, the courts accorded the individuals in possession of the materials sought to be discovered an opportunity to be heard in opposition to the subpoenas issued; moreover, the courts rendered a decision on the availability of the materials *only after* having first made a determination as to whether the seeking parties had made a showing sufficient to overcome the threshold burden. In no case of which your *amicus* is aware, except that sought to be placed before the Court herein, has a court ordered the production of materials by a third party, in connection with a criminal proceeding, prior to having held a full hearing and having ruled on any asserted

defenses to production. See, *e.g.*, *United States* v. *Orsini*, 424 F.Supp. 229 (E.D.N.Y. 1976), *aff'd.*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977); *Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972); *Kansas* v. *Sandstrom*, 4 Med.L.Rep. 1333 (Kan. 1978); *Rosato* v. *Superior Court*, 41 Cal. App.3d 190 (1975), *cert. denied*, 427 U.S. 912 (1976); *Farr* v. *Superior Court* 22 Cal.App.3d 60, *cert. denied*, 409 U.S. 1011 (1971); *Morgan* v. *Florida*, 337 So. 2d 95 (Fla. 1976); *New Jersey* v. *De La Roche*, 3 Med.L.Rep. 2317 (N.J.Super.Ct. 1977).

In the instant case, however, the trial court denied a hearing and refused to render a ruling on the validity of petitioners' motion to quash. Thereafter, in the contempt proceedings, Judge Trautwein, without examining into or permitting full analysis of the asserted privileged nature of the materials sought, held petitioners in contempt for failing to obey the subpoena and Judge Arnold's order. This was a fundamental denial of due process. It is not enough to say that petitioners were granted a hearing; the hearing must be a "meaningful" one. *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). The fact that the judge, who witnessed the alleged contempt, may have stated his reasons and allowed response to his intent to hold petitioners in contempt does not relieve the trial court of its responsibility to grant a full and meaningful hearing. *Taylor* v. *Hayes*, 418 U.S. 488, 498-500 (1974). It is fundamental to the concept of due process that a party must be afforded an opportunity to be heard by the court. If the court fails or refuses to grant such an opportunity, especially where the privileged nature of the materials sought has been asserted, it is gross error for the court to enter judgments of contempt against the individual in possession of the information. This concept has been recognized with regard to assertions of the privilege against self-incrimination, and is clearly applicable in the instant case:

> On the other hand, refusal to answer a question in order that the witness may in good faith interpose even an unfounded objection to making answer thereto, and obtain a ruling of court thereon is not unjustifiable, and is wholly within the rights of the witness. In such case to be unjustifiable and constitute contempt the refusal to answer must be made *after the court has ruled upon the question of privilege* and directed that answer be made.

Gendron v. *Burnham*, 82 A.2d 773 (Me. 1951) (emphasis added); *cf.*, *Maness* v. *Meyers*, 419 U.S. 449 (1975).

The contempt power, while an inherent power of the courts, is an "arbitrary" power which is "liable to abuse." *Ex Parte Terry*, 128 U.S. 289, 313 (1888). "Its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions." *Cooke* v. *United States*, 267 U.S. 517, 539 (1925). This Court has long been sensitive to the abuses which may attend the contempt power, and, for that reason, has been especially cognizant of the due process considerations which attend any use of that power. In *Taylor* v. *Hayes*, *supra*, this Court reversed contempt convictions stemming from a lawyer's conduct during a trial. Despite the fact that the attorney had been permitted to respond on each occasion in which the trial court had indicated that he would be held in contempt, this Court held that the summary contempt citations entered against the attorney at the termination of the trial constituted a denial of due process. In that case, at each occurrence, the attorney was permitted to respond. In the instant case, the petitioners have never even been allowed the right to insist that the moving parties for disclosure of information present testimony and/or evidence which would establish a putative right to the materials sought.

In the instant case, petitioners have been presented with orders requiring them to perform affirmative acts (*i.e.*, turn over the materials requested) and have been held in contempt for refusing to obey such orders in the absence of any opportunity to fully argue the legality of such orders. Entry of contempt orders in such situations was recognized as a clear

abuse of judicial power by this Court long before "procedural due process" became a fully developed judicial doctrine. In *Hovey* v. *Elliott,* 167 U.S. 409 (1897), in overturning a contempt conviction, this Court stated:

> A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
>
> * * *
>
> Can it be doubted that due process of law signifies a right to be heard in one's defense." If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent.

In *Galpin* v. *Page,* 85 U.S. 350, 368 (1874), the court said:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered."
>
> * * *
>
> If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law? No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other, the one as pointedly as the other would convert the judicial department of the government into an engine of oppression, and would make it destroy great constitutional safeguards.

167 U.S. at 414-419.

In light of this Court's approach to the question of due process in both *Hovey* v. *Elliott, supra,* and *Galpin* v. *Page, supra,* it would appear unconscionable to this amicus that this Court could permit the majority decision of the Supreme Court of New Jersey in this case to stand. What the ultimate result might be in today's state of the jurisprudence as regards the First Amendment question is immaterial. That question cannot

be reached until first there has been procedural due process. What is material is that even a newspaper and reporter are entitled to at least the due process afforded a member of the general populace. Need we remind this Court that it has very pointedly stated in at least two cases in the past term that journalists are entitled to no more, but certainly no less, rights than the general populace. *Houchins* v. *KQED, inc.*, ___ U.S. ___, 57 L.Ed.2d 553 (1978); *Zurcher* v. *Stanford Daily*, ___ U.S. ___, 56 L.Ed.2d (1978). If there be any consistency in the law today, it is inconceivable to this amicus that a different type of due process or none at all can be afforded newspapers and reporters as has happened in the case before this Court. To uphold such a ruling would represent pure sophistry and miscarriage of justice that could not help but bring about a drastic philosophical conflict within major segments of our populace.

This amicus cannot emphasize too strongly its absolute abhorrence of the lack of procedural due process afforded the petitioners in this matter by both the trial courts of New Jersey and by the New Jersey Supreme Court.

CONCLUSION

It is respectfully urged that this Court grant the Petition for a Writ of Certiorari in order that the significant constitutional issues raised therein may be fully examined.

Respectfully submitted,

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